

No.

83-1914

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ORIGINAL

Supreme Court, U.S.
FILED

JUN 11 1984

ALEXANDER L. STEVENS
CLERK

JEFFERSON COUNTY, KENTUCKY,
DETECTIVE JONES,
LIEUTENANT COLONEL ROEMELE,
LIEUTENANT SPELLMAN,
DETECTIVE TANGEL,
SERGEANT W. HOWARD, and
DETECTIVE CHESER,

- - - - - PETITIONERS

versus

EARL M. BUCHANAN

- - - - - RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now the Respondent, Earl M. Buchanan, Pro Se, and moves this Honorable court pursuant to Title 28, United States Code § 1915 for leave to proceed therein without prepayment of costs.

The Respondent has previously been granted leave to proceed in forma pauperis in both the United States District Court for the Western District of Kentucky (Louisville Division) and the United States Court of Appeals for the Sixth Circuit.

The Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

Earl M. Buchanan

Earl M. Buchanan, Pro Se
Respondent
Kentucky State Penitentiary
Box 128, Eddyville, Kentucky 42038

3380

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

I, Earl M. Buchanan, being first duly sworn according to law, depose and say that I am the respondent in the above-entitled cause.

That in support of my motion to proceed without being required to prepay Fees, Costs, or give Security therefor;

I state that because of my poverty I am unable to pay the costs of said cause or to give security therefor;

and that I believe I am entitled to the redress I seek in said cause. I further swear that the responses that I have made to the questions asked below relating to my ability to pay the cost of proceeding in this court are true and correct.

1. That I own no checking or savings account.
2. That I own no real estate, stocks, bonds, notes, automobiles or other valuable property.
3. That I have received no income from a business, profession, or other form of self-employment.
4. No persons are dependent upon me for support.
5. I am not presently employed, because of my confinement at Kentucky State Penitentiary.

I understand that a false statement or answer to any of the above will subject me to penalties for perjury.

COMMONWEALTH OF KENTUCKY }
COUNTY OF LYON }

SS: Earl M. Buchanan
(affiant signature)

Subscribed and sworn to before me a notary by Earl M. Buchanan, on this 5th day of June, 1984.

My Commission expires: November 15, 1986

Notary Public: [Signature]

[state-at-large]

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JEFFERSON COUNTY, KENTUCKY,
DETECTIVE JONES,
LIEUTENANT COLONEL ROEMELE,
LIEUTENANT SPELLMAN,
DETECTIVE TANGEL,
SERGEANT W. HOWARD, and
DETECTIVE CHESER, - - - - - petitioners

versus

EARL M. BUCHANAN - - - - - RESPONDENT

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION IN OPPOSITION TO THE WRIT OF CERTIORARI

BRIEF FOR RESPONDENT

EARL M. BUCHANAN, PRO SE
BOX 128
EDDYVILLE, KENTUCKY 42038

QUESTIONS PRESENTED FOR DENYING REVIEW

1. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY APPLIED THE TOLLING STATUTE § 413.310, KENTUCKY REVISED STATUTE WHICH PROVIDES: " THE TIME OF A CONFINEMENT OF THE PLAINTIFF IN THE PENITENTIARY SHALL NOT BE COUNTED AS PART OF THE PERIOD LIMITED FOR THE COMMENCEMENT OF AN ACTION".
2. WHETHER THE PETITIONER'S POLICE OFFICERS ARREST OF THE RESPONDENT WITHOUT A WARRANT AND WITHOUT PROBABLE CAUSE WITHIN THE MEANING OF THE FOURTH AMENDMENT, WAS A VIOLATION OF THE RESPONDENT'S CONSTITUTIONAL RIGHTS.

JURISDICTION

THIS IS A CIVIL CASE, THE JUDGMENT WAS ENTERED FEBRUARY 14, 1984 IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. THE JURISDICTION OF THIS COURT IS INVOKED PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 1254 (1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THIS CASE INVOLVES SECTION § 413.310, OF THE KENTUCKY REVISED STATUTE: WHICH PROVIDES THAT;

" the time of confinement of the plaintiff in the penitentiary shall not be counted as part of the period limited for the commencement of an action".

THIS CASE ALSO INVOLVES SECTION 413.140 (1)(c), Kentucky Revised Statutes which provides that:

"(1) The following actions shall be commenced within one (1) year after the cause of action accrued:

"(c) an action for malicious prosecution, conspiracy, arrest, reduction, criminal conversation or breach of promise of marriage".

THIS CASE ALSO INVOLVES Title 42, United States Code, Section 1983, which provides that:

"Every person who, under color of any statute ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

THIS CASE ALSO INVOLVES the Fourth Amendment which provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides that:

" All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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OCTOBER TERM, 1983

JEFFERSON COUNTY, KENTUCKY,
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LIEUTENANT COLONEL ROEMELE,
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SERGEANT W. HOWARD, and
DETECTIVE CHESER, - - - - PETITIONERS

Versus

EARL M. BUCHANAN - - - - RESPONDENT

BRIEF IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices
of the Supreme Court of the United States: The Respondent herein
respectfully prays that the writ of Certiorari to review the Judg-
ment and opinion of the United States Court of Appeals for the
Sixth Circuit entered in this cause on February 14, 1984, be denied.

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment was
entered February 14, 1984 should be affirmed, it is unreported,
and is reprinted in the appendix to the Brief in opposition to
the Petition. The opinion of the United States District Court
for the Western District of Kentucky was entered on February 11,
1983 is also unreported and is reprinted in the appendix to this
Brief in opposition.

STATEMENT OF THE CASE

The respondent, Earl M. Buchanan, filed a civil suit pursuant to 42 U.S.C. § 1983 in the United States District Court for the Western District of Kentucky at Louisville. The jurisdiction was invoked pursuant to 28 U.S.C. § 1343 on October 19, 1982, Chief United States Magistrate, George J. Long entered an order that the complaint be filed and granted leave to proceed in forma pauperis.

This case was assigned to the Honorable Charles M. Allen, Chief Judge, United States District Court for the Western District of Kentucky at Louisville.

Respondent was taken into custody by petitioner's [police] on January 14, 1981 at the early morning hours of 2:00 a.m. The petitioners police officers came to the respondent's residence with a warrant for the arrest of respondent's brother.

After the door to the house was opened, the petitioners police officers forced there way into the house with their guns drawn and arrested respondent's brother.

The petitioners police officers next with their guns aimed at respondent, ordered him to get out of bed, and was then searched, made to get dressed, and then handcuffed and taken to the Jefferson County Police Station where he was held incommunicado for over (8) eight hours without probable cause, nor reasonable grounds to arrest respondent.

The petitioners police officers forced respondent to be in approximately (8) eight different lineups against his will and without lawful authority.

No charges was placed against respondent until after the police forced respondent to be placed in the lineups at the Jefferson County Police Department, where he was the only participant in the lineups that had a full beard, plus the police officers had taken pictures of respondent prior to the lineups conducted at the Jefferson County Police Station. The two lawyers that were called to the police Station for respondent's brother, the police would not allow neither attorney into the room with the police and witnesses while the lineups were being conducted. One of the attorneys requested to be present with the police officers and witnesses during the lineups.

The District Court granted summary judgment to petitioners based upon the respondent's failure to file his civil action within the applicable period of limitation. However the District Court did not apply the State of Kentucky's tolling statute. (App.4a-6a Memorandum opinion of District Court, dated 2/11/83).

The United States Court of Appeals for the Sixth Circuit issued an order reversing the District Court's judgment based upon the Kentucky tolling Statute (app.1a).

REASONS FOR THE DENIAL OF WRIT

The judgment of the Court of Appeals in this case relied on the applicable State Statute of Limitation and the relevant tolling provisions, this Court in Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440,(1980), held that Federal Courts were "obligated not only to apply the analogous New York Statute of Limitations to respondent's Federal Constitutional claims, but also to apply the New York rule for tolling that Statute of limitations.

The Kentucky legislature has specifically provided for the tolling of the Statute of Limitations, Kentucky Revised Statute Section § 413.310 provides that;

" The time of confinement of the plaintiff in the penitentiary shall not be counted as part of the period limited for the commencement of an action".

The respondent contends that Rule 17.1 (a) of the Supreme Court of the United States is not appliable to this case. There is no conflict with the decision of another Federal Court of Appeals on the same matter render by the Sixth Circuit.

Based on the foregoing the Court of Appeals for the Sixth Circuit has rendered its decision on the bases of this Court's mandate issue in Board of Regents V. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440,(1980) of which has been followed in Fernandez v. Tully, 681 F.2d 42,(1st Cir. 1982); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438,(2nd Cir. 1980); Aitchison v. Raffiani, 708 F.2d 96,(3rd Cir. 1983); Miller v. Smith, 625 F.2d 43,(5th Cir. 1980); Yarber v. Allstate Insurance Company, 674 F.2d 239,(4th Cir. 1982); Wakeen v. Hoffman House, Inc., 724 F.2d 1238,(7th Cir. 1983); Martin v. Aubuchon, 623 F.2d 1282,(8th Cir. 1980); Conerly v. Westinghouse Electric Corp., 623 F.2d 117 (9th Cir. 1980); Brown v. Bigger, 622 F.2d 1025, (10th Cir. 1980); McGhee v. Ogburn, 707 F.2d 1313,(11th Cir.1983)

WHEREFORE, the respondent prays that the Petition for a Writ of Certiorari be DENIED.

I. K.R.S. 413.310 IS NOT INCONSISTENT WITH THE
POLICY OF DETERRENCE INHERENT IN 42 U.S.C. § 1983

In this Court's mandate of the controlling case of Board of Regents v. Tomanio, 446 U.S. at 484, held that application of State tolling rules to § 1983 claims is required by 42 U.S.C. § 1988.

There is no question that the Kentucky Legislature has their power to enact this Statute § 413.310 and absent more specific language indicating the statute should be applied on a case by case basis, it should be applied generally to all prisoners. Nor should the fact that this suit was brought while respondent was still in prison to have any effect upon the interpretation of the State Statute.

Since Congress has decided that § 1983 class actions brought in different States, like individual action under § 1983, will be governed by differing statutes of limitations and differing rules regarding tolling and tolling effects unless those state rules are inconsistent with Federal Law.

It should be noted that the respondent's claim is distinguish from Major v. Arizona State Prison, 642 F.2d at 315 n. 6, "His confinement in the Arizona State Penitentiary did not strip him of his legal capacity to sue under 42 U.S.C. § 1983 and, therefore, his imprisonment cannot be considered a "disability" within the meaning of Arizona's tolling provision.

Since the State of Kentucky's Statute for tolling is applied within this State to all prisoner's confined in any and all of the Institutions within the State. The Kentucky Legislatures have set provisions for application of Limitations;

- (1) "Imprisonment as tolling statute of limitation. 24 ALR 2d 618
- (2) "Imprisonment of Party to civil action as tolling Statute of Limitation. 77 ALR 3d 735.

The petitioner's in their petition contends that the Sixth Circuit and Ninth Circuits are in direct conflict as to their construction and application of similar tolling provisions.

It is evident that the Ninth Circuit's decision rendered in Major v. Arizona State Prison, 642 F.2d 311, (9th Cir. 1981), is in direct conflict with only this Court's mandate of Tomanio, and the decisions rendered in the First Circuit, Second Circuit, Third Circuit, Fourth Circuit, Fifth Circuit, Fifth Circuit, Sixth Circuit, Seventh Circuit, Eighth Circuit, Tenth Circuit, and Eleventh Circuit. Each Circuit's Court of Appeals decision's rendered has cited Tomanio supra.

The Sixth's Circuits decision in this case is similar to those issue in Miller v. Smith, 625 F2d 43, (5th Cir. 1980), the Fifth Circuit held;

" We are now of the opinion that under the teachings of Tomanio. . . the prisoner was entitled to the benefit of a Texas tolling Statute according to its express terms

and the Tenth Circuit in Brown v. Bigger, 622 F.2d 1025, (10 Cir. 1980), the Court held that;

"In interpreting other provisions of this tolling Statute, Courts have given literal meaning to the language . . .

We most similarly give effect to the Statute's plain meaning notwithstanding the fact appellant was able to bring this suit while incarcerated.

Petitioner's correctly argues that prisoner's today are generally less restricted than they were historically. Certainly the increased right to counsel, the right to have transcripts of trial records, and the access to law libraries have rendered prisoners much less isolated and restricted. However this fact alone does not render the Kentucky's Statute for tolling a suits limitation period unconstitutional or inconsistent with the Legislature intent.

The purpose of the Statute is to provide prisoners with additional time to assert their legal rights. There is no question that the Legislature had the power to enact this Statute and determine the conditions under which a right may accrue and the period in which a right may be asserted.

The Respondent submits that the only circumstances that would suspend or toll the running of the limitation period under 413.310-KRS, ^{are/} those expressly provided under State Law.

As a general practice, where congress has created a federal right without proscribing a period for enforcement, the Federal Courts uniformly borrow the most analogous state Statute of Limitations. Thus the applicable period of limitation is derived from that which the State would apply if the action had been brought in a State Court.

In virtually all Statutes of Limitations the Chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application.

II. THE COURT OF APPEALS DID NOT ERROR BY NOT
EXAMINING THE PETITIONER'S ARGUMENT ON
"THE PROBABLE CAUSE ISSUE".

The petitioner's (police officers) in the District Court has contended that the robbery of the Short Stop Food Mart at 8811 Old Third Street Road in Louisville, Kentucky on December 24, 1980, supplied the probable cause for the arrest of Respondent.

First it should be noted that with the numerous factors that the petitioner's claim based the probable cause for the respondent's arrest in this case, of which they claim all of the information was within their knowledge on the morning of January 14, 1981 the day they took respondent into custody.

Notwithstanding the fact that petitioner's claim they had numerous factors for the arrest of respondent, in spite of the factors that they claim were within their knowledge on January 14, 1981, the petitioners still did not seek an arrest warrant for the respondent for the robbery of the Short Stop Food Mart.

The respondent contents that no arrest warrant was issued or sought in this case.

Surely the petitioner's with the knowledge they claim of the numerous factors, would have without a doubt sought a warrant for respondent's arrest at the same time they sought the arrest warrant for respondent's Brother Calvin Buchanan.

The respondent in the District Court sought information from the petitioners (police officers) pursuant to the authorities of Federal Rules of Civil Procedures Rule 26, to get prime facie facts which would have shown in the affirmative that the robbery charge that the petitioners claims probable cause for the arrest of respondent was unreliable. (see, Motion for Discovery at page 7a appendix).

The petitioners know or should have known that two weeks before they arrested the respondent for the robbery of the Short Stop Food Mart at 8811 Old Third Street Road, that said robbery case had been closed by the Jefferson County Police Department on/or about December 30, 1980, due to the fact that both the perpetrator's of the Crime were positively identified by the eyewitnesses of the robbery at a lineup held at the Jefferson County Police Department. (see, Response to motion Summary, P. 10a).

It is obvious and evident in this case that such information as the petitioners are asserting, could not constitute probable cause for the respondent's arrest in the instant case.

It is well settled law that an "arrest" which is made without a warrant is not violative of the constitution only if "at the moment the arrest was made" . . . the officer's had probable cause to make it - - - whether at that moment the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the person arrested had committed or was committing an offense.

This Court held in Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), that;

" The defense of good faith and probable cause" available to a police officer under section 1983, there is no suggestion that a police officer is entitled to a defense of good faith when he makes an arrest without a warrant and without probable cause.

The petitioners in this case acted in their own unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant for the respondent. Beck v. State of Ohio, 379 U.S. 89, 85 S.Ct. 223, (1964);

" An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar short comings of hindsight judgment".

CONCLUSION

WHEREFORE, the respondent for the reasons stated herein and the authorities relied upon in this respond to the petitioners Petition for Writ of Certiorari, respectfully prays that the Petition for A Writ of Certiorari be DENIED.

Respectfully submitted,

Earl M. Buchanan

Earl M. Buchanan, Respondent
Kentucky State Penitentiary
P. O. Box 128
Eddyville, Kentucky 42038

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition in Opposition for a Writ of Certiorari pursuant to the rules of this Court has been mailed to William T. Warner, Counsel for Petitioners, postage prepaid addressed to law offices of Nold, Mosley, Clare, Hubbard, and Townes, Fifth Floor, Hart Block Building, 730 West Main Street, Louisville, Kentucky 40202, on this 6th day of June, 1984.

Earl M. Buchanan
Earl M. Buchanan, Respondent

FILED

FEB 14 1984

JOHN P. HEHMAN, Clerk

NO. 83-5143

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EARL MILES BUCHANAN

Plaintiff-Appellant

v.

COUNTY OF JEFFERSON; MITCH MCCONNELL;
DETECTIVE JONES; CHIEF EDGAR HELM;
LT. COL. ROEMELE; LT. SPELLMAN;
DET. TANGEL; SGT. W. HOWARD; DET.
HALL; DET. CHESER

O R D E R

Defendants-Appellees

BEFORE: LIVELY, Chief Circuit Judge; EDWARDS, Circuit Judge;
and TAYLOR, District Judge*

This pro se plaintiff appeals from a district court judgment dismissing his civil rights complaint filed under 42 U.S.C. §1983. Plaintiff sought monetary damages from a judge, a county police department and several of its officers for allegedly having falsely arrested him on January 14, 1981. The district court dismissed the complaint for being time-barred under Kentucky's one year statute of limitations for bringing claims of false arrest and malicious prosecution. The complaint was filed on October 19, 1982, which was twenty-two months after the plaintiff was arrested and sixteen months after the charges for which he was arrested were dropped. In its ruling, the district court concluded that the statute of limitations was not tolled by the plaintiff's incarceration.

*The Honorable Anna Diggs Taylor, Judge, U.S. District Court for the Eastern District of Michigan, sitting by designation.

***** APPENDIX *****

***** APPENDIX *****

***** APPENDIX *****

Federal courts are obligated to apply the most analogous state statute of limitations and its rules for tolling the statute to the fullest extent possible consistent with the Constitution and laws of the United States. Board of Regents v. Tomanio, 446 U.S. 478 (1980). In the instant case, the most analogous Kentucky State statute of limitations is its one-year time period allowed for bringing claims of false arrest and malicious prosecution provided under K.R.S. §413.140(1)(c). See Carmicle v. Weddle, 555 F.2d 554 (6th Cir. 1977)(per curiam). Kentucky also has a tolling statute, K.R.S. §413.310, which provides: "The time of a confinement of the plaintiff in the penitentiary shall not be counted as part of the period limited for the commencement of an action."

The Sixth Circuit has recognized the validity of this tolling statute as being available for use by Kentucky state prisoners bringing §1983 actions. See Cunningham v. Jones, 567 F.2d 653, 654 n. 2 (6th Cir. 1977), and Kirby v. Thomas, 336 F.2d 462 (6th Cir. 1964). The Sixth Circuit has also recognized the validity and application of other similar tolling statutes to prisoners' §1983 actions. See Austin v. Brammer, 555 F.2d 142 (6th Cir. 1977)(per curiam)(Ohio).

Since the plaintiff was incarcerated throughout the time period prior to his filing of his lawsuit, this court concludes that the applicable Kentucky one year statute of limitations was tolled during the time of plaintiff's incarceration.

The panel unanimously agrees that oral argument is not necessary in this appeal. Rule 34(a), Federal Rules of Appellate Procedure. The district court's judgment is, accordingly, reversed. Rule 9(d)4, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

John P. Helman
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

EARL MILES BUCHANAN,)
Plaintiff,)
v.)
COUNTY OF JEFFERSON, et al,)
Defendants.)

CIVIL ACTION
No. C 82-0623 L(A)

MEMORANDUM OPINION

This action is submitted to the Court on the defendant's motion for summary judgment. The plaintiff has responded to the motion. Because we believe that this action is ruled by Carmicle v. Weddle, 555 F.2d 554, 555 (6th Cir. 1977), we grant the defendants' motion.

This prisoner action was filed pro se and in forma pauperis by Earl Miles Buchanan. It alleges that Buchanan was maliciously and falsely arrested by the defendants in deprivation of his rights under the Fourteenth Amendment of the United States Constitution. The action was filed in September of 1982 under 42 U.S.C. Sec. 1983.

The arrest complained of occurred in January of 1981 and the charges were dismissed in June of 1981. Plaintiff was in prison most of the intervening time on an unrelated charge.

The defendants plead probable cause and the statute of limitations. Because the statute had run well before the filing of the complaint, we need not consider the issue of probable cause.

Actions filed under Sec. 1983 have no "internal" limita-

tions by statute; they must rely instead on state actions to which they are most closely analogous. Carmicle, supra; Mason v. Owens-Illinois, Inc., 517 F.2d 520, 521 (6th Cir. 1975). This complaint clearly alleges wrongs closely akin to malicious prosecution and false arrest, and would be so construed in state court. The question then remains only whether the action was filed timely, i.e., when the cause accrued, whether it was tolled, and when it was filed.

The present cause of action accrued at the very latest when the last charges were dropped. Farris v. Sears Roebuck & Co., 413 F.Supp. 594 (W.D. Ky. 1976). In this case that date was June 24, 1981.

The Sixth Circuit has never recognized tolling of Sec. 1983 actions for those in prison or otherwise institutionalized. Cf. Kenney v. Killian, 232 F.2d 288 (6th Cir. 1955). Since the action was not filed until over a year after the accrual of the cause of action, the one year Kentucky malicious prosecution limitation section bars this Sec. 1983 action. Ky. Rev. Stat. Sec. 413.140(1)(c).

Wherefore, the motion for summary judgment must be granted. An order to this effect is today entered.

Dated 2-11-83

Charles M. Allen, Chief Judge

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

AT LOUISVILLE

EARL MILES BUCHANAN,)	
Plaintiff,)	
v.)	CIVIL ACTION
COUNTY OF JEFFERSON, et al,)	C 82-0623 L(A)
Defendants.)	

SUMMARY JUDGMENT

The defendant, having moved for summary judgment, and the plaintiff, having responded, and the Court, being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the defendant's motion be and it is hereby sustained, and the action dismissed with prejudice.

This is a final and appealable judgment and there is no just cause for delay.

Dated 2-11-83

Charles M. Allen
Chief Judge

cc: Counsel of Record

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

EARL MILES BUCHANAN,

PLAINTIFF

-VS-

DET. CHESER, DET. HALL,
SGT. W. HOWARD, DET. TANGEL,
LT. SPELLMAN, DET. JONES,
COUNTY OF JEFFERSON,
DEFENDANTS

CIVIL ACTION NO. C 82-0623-L(A)

MOTION FOR DISCOVERY

Comes the plaintiff, Earl Miles Buchanan, without counsel and moves the court pursuant to the authority of Rule 26 Federal Rules of Civil Procedure for the issuance of an order to the defendants for the production, inspection and copying of the documents listed or requested below, and serve a copy of each to the plaintiff all the evidence as more particularly described below.

(1) Copies of the pictures taken during the lineups and transcripts of the tape recordings from the lineup held on January 14, 1981 concerning the robbery charge that the plaintiff was arrested on. The names and addresses of all persons that participated in the lineup. The names of the police officers that conducted the lineup, and the names of any attorney that was present at the police station before or during the lineups.

(2) A copy of the transcripts of the taped confession that the defendants played during the incommunicado interrogation of the plaintiff, whom the plaintiff later learned that the taped confession was made by Kevin Standford.

(3) Copies of the documents, reports filed in connection with the investigation and search of the resident at 3703 West Kentucky Street, Louisville, Kentucky 40211, and copies of the documents listing precisely what the defendants seized during the search.

(4) A transcribed copy of affiant Det. Tangel's sworn statement that supplied the probable cause for the search of the resident named in the warrant, more particularly described as (3703 West Kentucky Street). Copies of all arrest and search warrants applied for by the Jefferson County Police Department on January 14, 1981 in the Jefferson District or Circuit Court of Jefferson County, Kentucky.

(5) Copy of the transcripts of the preliminary hearing held on February 5, 1981 in the case-styled Commonwealth of Kentucky v. Earl M. Buchanan NO. 81F000380A in the District Court Jefferson Co., Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202.

(6) Copies of the transcripts of the lineup viewed by the witnesses McCrecklin and Southard where they made a positive identification of the two suspects on/or about the 30th day of December 1980. Copies of the photo-packs taken of the lineup, any and all statements, reports, papers, documents, tangible objects and information of any form relating to the above styled robbery case concerning the Food Mart on third street that was robbed on/or about the 23 day of December 1980, including a transcript of the preliminary hearing held on the above case.

(7) The names and addresses of the persons that participated in the lineup, including the police officers that conducted the lineup and made the arrest of the two suspects during the month of December 1980.

WHEREFORE, the plaintiff respectfully request that the relief sought in the motion be in all respects granted.

Respectfully submitted,

Earl M. Buchanan
Earl Miles Buchanan, Plaintiff
Box 128
Eddyville, Kentucky 42038

CERTIFICATE OF SERVICE

This is to certify that a copy of the motion for Discovery has been mailed this 26th day of November 1982, to Hon. N. Scott Lilly, Assistant Jefferson County Attorney, 621 West Main Street, Louisville, Kentucky 40202, and Hon William T. Warner, Attorney at law, Nold, Mosley, Clare, Hubbard & Rogers, Fifth Floor, Hart Block Building, 730 West Main Street, Louisville, Kentucky 40202.

Earl M. Buchanan
Earl Miles Buchanan, Plaintiff
Box 128
Eddyville, Kentucky 42038

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

EARL MILES BUCHANAN,

PLAINTIFF

VS.

COUNTY OF JEFFERSON,
DET. CHESER, DET. HALL
SGT W. HOWARD, DET. TANGEL,
LT. SPELLMAN, DET. JONES,

DEFENDANTS

CIVIL ACTION NO.

C 82-0623-L(A)

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Comes the plaintiff, Earl M. Buchanan, Pro Se, and for his response to the defendants motion for summary judgment states as follows;

The first and foremost reason summary judgment should not be granted to the defendants is that the robbery of the short stop food mart at 8811 old third street Road, Louisville, Kentucky that the defendants contends supplied probable cause for the plaintiff's arrest.

Both perpetrator's of the robbery were positively identified by the witnesses on/or about December 30, 1980 at a line up held at the Jefferson County Police Department, further the witnesses identified the suspects at a hearing in the Jefferson district Court,

Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202.

The defendants during the lineup would not let either of the two attorneys of plaintiff's brother into the room where the defendants and witnesses were.

One the the attorneys requested to be present with the defendants and witnesses during the lineup, but the defendants would not let the attorney enter the room.

In the plaintiff's case there is no probable cause present that he committed the allege robbery, since two weeks before he was arrested the robbery case was closed due to the fact that the perpetrator's of the crime were identified by the witnesses on December 30, 1980. Obviciously such information could not constitute probable cause for the plaintiff's arrest.

ARGUMENT I

DEFENDANTS HAD NO PROBABLE CAUSE TO ARREST THE PLAINTIFF, THUS MAKING THEM LIABLE UNDER 42 U.S.C. SEC. 1983 FOR DEPRIVATION OF LIFE, LIBERTY & PROPERTY

At 2:00 a.m. on January 14, 1981 the defendants came to plaintiff's resident with a warrant for the arrest of plaintiff's brother Calvin Buchanan, after seeing plaintiff sleeping in the some room, defendants forced plaintiff out of bed at gun point.

First it should be noted that the allege robbery charge that the defendants contends supplied the probable cause for the arrest of plaintiff was closed on December 30, 1980 after the perpetrator's of the crime were arrested and identified by the witnesses. The plaintiff was arrested on January 14, 1981.

It is well settled that an arrest which is made without a warrant is not violative of the constitution only if "at the moment the arrest was made, the officers had probable cause to make it - whether at that moment the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the "person arrest" had committed or was committing an offense.

In Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213 (1967) the Supreme Court refers to;

"The defense of good faith and probable cause" available to a police officer under sec. 1983, there is no suggestion that a police officer is entitled to a defense of good faith when he makes an arrest without a warrant and without probable cause.

In the plaintiff's case he contends that the facts at page 2 of the defendants memorandum in support of Summary judgment were not within their knowledge at the time of the plaintiff's arrest. the simple fact is that on the sparse information at the officers command, no arrest warrant could have issued. Jones v. United States, 362 U.S. 257 (1960) the Supreme Court held;

To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy.

In the plaintiff's case the quantum of information came about after the plaintiff's arrest. Giordenell v. United States, 357 U.S. 480 (1958), The Supreme Court stated that;

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The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would "leave law-abiding citizens at the merey of the officers whim or caprice."

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CONCLUSION

THEREFORE, the plaintiff for the foregoing reasons submitted herein, plaintiff request that the defendants motion for summary judgment be denied.

The plaintiff is entitled to a trial by jury on the issues setforth in his complaint. the plaintiff has submitted his motion for trial by jury with his response.

Respectfully submitted,

Earl M. Buchanan
Earl M. Buchanan, Plaintiff
Box 128
Eddyville, Kentucky 42038

CERTIFICATE

I hereby certify that copies of the foregoing response to summary judgment and motion for trial by jury has been mailed to the Hon. N. Scott Lilly, Assistant County Attorney, 621 West Main Street, Louisville, Kentucky 40202, and Hon. William T. Warner, Nold, Mosley, Clare, Hubbard & Rogers, Fifth Floor, Hart Block Building, Louisville, Kentucky 40202. *mailed this 2nd day of February 1983*

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